ORIGINAL

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION, INC., COX COMMUNICATIONS GULF COAST, L.L.C., *et. al.* *Complainants,* v. GULF POWER COMPANY, *Respondent.*	DOCKET FILE COPY ORIGINAL E.B. Docket No. 04-381

To: Office of the Secretary

Attn: The Honorable Richard L. Sippel
Chief Administrative Law Judge

COMPLAINANTS' REPLY TO GULF POWER'S RESPONSE TO COMPLAINANTS' *THIRD MOTION TO COMPEL*

The Florida Cable Telecommunications Association, Inc., Cox Communications Gulf Coast, L.L.C., Comcast Cablevision of Panama City, Inc., Mediacom Southeast, L.L.C., and Bright House Networks, LLC ("Complainants"), by their attorneys and pursuant to this Court's Order dated October 26, 2005, respectfully submit the following Reply to Respondent Gulf Power Company's ("Gulf Power") Response to Complainants' October 7, 2005 Third Motion to Compel ("Third Motion to Compel") production of responses to certain documents requests and interrogatories.

BACKGROUND

This discovery dispute arises from Gulf Power's failure to comply with the Presiding Judge's September 22, 2005 Second Discovery Order ("*Second Discovery Order*"). The *Second Discovery Order* directed Gulf Power to file, by September 30, 2005, supplemental responses to ten

document requests (numbers 1, 2, 4-7, 8, 12, 14 and 15) and six interrogatories (numbers 8, 20, 25, 34, 35, and 46) served by Complainants. However, on September 30th, Gulf Power failed to produce a *single additional document* and provided inadequate "second supplemental" responses to the interrogatories.[1] Instead of complying with the *Second Discovery Order*, Gulf Power simply reiterated its earlier argument that Complainants could find documents responsive to their document requests and interrogatories among those documents "made available for inspection" previously, without providing any markers, such as locations, offices, files, or document numbers, to identify the particular documents Gulf Power considered responsive to Complainants' individual discovery requests. *See* Gulf Power's Supplemental Response to Complainants' Second Request for Production of Documents ("*Supplemental Document Responses*"); Gulf Power Second Supplemental Responses to Complainants' First Set of Interrogatories ("*Supplemental Interrogatory Responses*"). Because Gulf Power's responses flouted, rather than followed, the *Second Discovery Order*, Complainants filed their Third Motion to Compel.

In its November 4, 2005 Response ("*Response*"), Gulf Power once again refuses to comply with the Presiding Judge's ruling in the *Second Discovery Order* that, when a party produces documents, either in response to document requests or in response to interrogatories, it must "*specify the records* from which the answer may be derived or ascertained." *Second Discovery Order*, 2 (emphasis added). Gulf Power claims that, as long as it makes available "documents kept

[1] With respect to three of the document requests, numbers 8, 14, and 15, Gulf Power filed a Motion to Reconsider the rulings in the Second Discovery Order. Complainants filed an Opposition to that Motion on October 6, 2005, and the Presiding Judge issued an Order on October 12, 2005. That Order (1) directed the parties to consider a Stipulation concerning Gulf Power's pole replacement practices that might partially resolve Document Request No. 8 (which the parties are continuing to discuss); (2) ruled that Gulf Power need not provide any further response to Document Request No. 14 but precluded Gulf Power "from using *pole availability or costs* to justify charging a rate above marginal costs" (emphasis added); and (3) required Gulf Power to respond to Document Request No. 15 by identifying those poles appearing on Gulf Power maps and diagrams that Gulf Power contends are at "full capacity" and/or "crowded." Accordingly, this Reply will not further address document requests numbers 8, 14, and 15 except to note that Gulf Power moved on November 4, 2005 to extend the time for responding to Number 15 until December 16, the discovery cut-off date, and that, pursuant to a telephone conference ruling on November 9, 2005, the Presiding Judge has ordered Gulf Power to respond to request number 15 by December 9, 2005.

in the usual course of business," *Response*, 3, it may produce the proverbial "entire haystack" of all of "Gulf Power's make-ready documents," *Response*, 2, instead of "specifying" documents responsive to Complainants' individual and subject-specific discovery requests as ordered by the Presiding Judge. Indeed, Gulf Power's Opposition appears to largely ignore the Court's *Second Discovery Order* and the express directives in multiple places that "It is not sufficient to merely state that the [requested documents] were made available for inspection and copying during the May 27-28 document review." Yet that is precisely what Gulf Power did in its supplemental response and its Opposition to Complainants' Third Motion to Compel.[2]

Gulf Power could not be more in the wrong. Indeed, an express failure to comply with the Court's directive would be sanctionable under the federal rules.[3] Moreover, the decisions relied upon by Gulf Power in its *Response* do not support its contention that, as long as it refers to documents kept in the usual course of business, it does not have to comply with the Court's *Second Discovery Order* or otherwise specify or identify the particular documents that actually answer a given document request or interrogatory. For example, in *Hagemeyer North America v. Gateway Data Sciences*, 22 F.R.D. 594, 598 (E.D. Wis. 2004), contrary to Gulf Power's contention that the court *held* that there was "no duty to label the document," *see* Response, 3, the court noted that materials offered for inspection were "kept in clearly labeled boxes." Moreover, the *Hagemayer* case involved apparently very general discovery requests for "e-mails, financial statements, employee billing statements, computer backup tapes and other documents."

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[2] *See, e.g., Second Discovery Order* with respect to Document Requests Numbered 1, 2, 4-7, and 15 and Interrogatory Number 8. For each of Gulf Power's supplemental responses for those items, Gulf Power refused to identify or specify documents (it sought reconsideration with respect to No. 15) and ignored the Court's direction saying, again, that the documents were made available at the May 27-28 inspection and produced no documents at all. In its Opposition, for each of these items it repeated the same litany of having made documents available for inspection. Importantly, Gulf Power had expressly represented in its original response to Interrogatory Number 8 that it would supplement its response upon completion of the Osmose Audit. No such supplementation has been made or offered.

[3] *See* FED. R. CIV. P. 37(b)(2).

Id. at 596. Yet, the court in *Hagemayer* reiterated the principle that "the responding party cannot attempt to hide a needle in a haystack by mingling responsive documents with large numbers of nonresponsive documents." *Id.* at 598. Similarly, in *Doe v. District of Columbia*, 231 F.R.D. 27, 2005 U.S. Dist. LEXIS 20487 (D.D.C. 2005), in addressing a motion to compel involving interrogatory responses, the court stated that the "plaintiff must either answer the interrogatory directly or *point defendant to the document or documents that provide the information requested*" (emphasis added). *Id.* at *26. That is what Complainants have sought here – a response that "points" to the actual documents that answer Complainants' specific questions. The *Doe* court did not hold that an interrogatory could be answered by simply saying "go look in my files." And this Court already directed that an answer such as "go look in my files" was insufficient, yet that was all that Gulf Power did in its Supplemental Responses.

The remaining two cases relied upon by Gulf Power also undermine its position. *G-I Holdings*, 218 F.R.D. 428, 439 (D.N.J. 2003), actually holds in part that the responding party had failed to meet its duty to specify responsive documents and that it had forced the requesting party "to determine, on its own, which documents are responsive to which Interrogatory and in what way." This is exactly what Gulf Power's broad-brush reference to all its "make-ready documents" does. In *G-I Holdings*, in considering a motion to compel responses to interrogatories, the court noted that a responding party has a "'duty to specify, by category and location' the records from which he knows the answer to the interrogatories can be found." *Id.* at 438. And the *G-I Holdings* court similarly noted that, as to document requests, the party moving to compel in that case had not alleged that the responding party's documents were produced "without designating" the "origins" or "names" of particular files, *id.* at 439, which is what Gulf Power has failed to do here by simply referring Complainants to "Gulf Power's make-ready

documents." *See Response*, 2. And in the final case relied upon by Gulf Power, *Morgan v. City of New York*, 2002 WL 1808233 at *4 (S.D.N.Y. Aug. 6, 2002), contrary to Gulf Power's suggestion that a responding party may simply produce thousands of pages of documents without making any effort to "specify" responsive documents, the court emphasized that, even though the requester had served six hundred and eighty (680) document requests, the respondents, who bate-stamped their documents, had "grouped" them "in specific and readily identifiable categories" that clearly pertained to the case issues. *Id.*

As the Presiding Judge recognized, it is well-established under the Federal Rules of Civil Procedure that a responding party has a "serious duty of responsiveness" and that, when a response refers to documents in the possession of the respondent, the respondent must address its response to each individual discovery request, not simply refer to "a mass of records as to which research is feasible only for one familiar with the records," as Gulf Power does here by continuing to refer, in response to each of Complainants' requests, simply to its "make ready documents." *Second Discovery Order*, 2; *Supplemental Document Responses*, 2-6. This important and equitable discovery principle is particularly applicable in this case, where Gulf Power has both the burdens of production and persuasion. The time has come for the entry of evidentiary, preclusion and/or witness-related orders.

We briefly discuss below the document requests and the interrogatory responses that remain unanswered in violation of the Court's *Second Discovery Order* and that were not ruled upon by the Order of October 12, 2005.[4]

[4] In an effort to make this Reply more succinct, Complainants will limit the discussion below to describing what each discovery request sought and why Gulf Power's answer is inadequate, rather than reciting, verbatim, the request and Gulf Power's responses. That detail is already set forth in Complainants' Third Motion to Compel.

ARGUMENT

I. Gulf Power Has Failed To Comply With the *Second Discovery Order*

Document Request No. 1:

Document Request No. 1 asked Gulf Power to specify the documents referring to those instances in which Gulf Power was *unable to accommodate* an additional attachment on poles already containing Complainants' attachments. This request is central to the issue to be adjudicated in the hearing – whether Gulf Power can show that it suffered a "missed opportunity" or "lost opportunity," *see Alabama Power v. FCC*, 311 F.3d 1357, 1370, 1371 (11th Cir. 2002), and therefore has a constitutional basis to claim an annual pole compensation beyond that already paid by Complainants in accordance with FCC rate regulations. Gulf Power's response to the *Second Discovery Order* was simply to refer to "make ready work orders" at its "Engineering & Construction offices." *Supplemental Document Responses*, 2. This response clearly does not "specify" documents showing instances where Gulf Power could not accommodate an additional attachment. Indeed, if anything, the reference to make-ready work orders shows documents in which, through its established and routine make-ready process, Gulf Power was able to, and in fact did, successfully accommodate additional attachments.

In its *Response*, apart from simply reiterating its general reference to "make ready work orders" made available for inspection on May 27th and 28th, a reiteration the Presiding Judge directed Gulf Power *not* to make, Gulf Power fails to specifically address any aspect of this request. *See Response*, 2-5. Gulf Power has neither produced, nor identified a single document showing that it was "unable" to accommodate additional attachments (i.e., that it had to turn down an opportunity to obtain more pole rental revenue, the second prong of the *Alabama Power* test), and, accordingly, it should be precluded from seeking to introduce any such documents at the hearing.

Document Request No. 2:

Document Request No. 2 asked for the documents supporting the costs that Gulf Power claims to have incurred because of Complainants' attachments. Both the *Second Discovery Order* and the Discovery Order of August 5, 2005 ("*Discovery Order*") required Gulf Power to specify and identify the documents showing "the actual costs of Gulf Power with respect to Complainants' attachments." *See Second Discovery Order* at 3; *Discovery Order*, 6, 20 n.16. This request is not, as Gulf Power claims to "understand" it, *see Response*, 3, confined to costs of make-ready for which Gulf Power has already been reimbursed pursuant to Gulf's own permit process and make-ready work orders, but is designed to discover documents supporting Gulf Power's claims that, whether in connection with the initial attachment process or the annual maintenance and operation expenses on its poles, it has incurred costs relating to Complainants' attachments for which it has not been compensated. The Presiding Judge pointed to Gulf Power's failure to deliver this critical documentation (which certainly does include the books and records on which Gulf relies for its claimed entitlement to a higher pole rate) in the telephone conference call earlier today. Yet Gulf Power's supplemental response of September 30, 2005, like its response on August 26th, does not identify even one specific document showing that it has incurred any unreimbursed costs relating to Complainants' attachments. Supplemental Document Responses, 2-3.

In its *Response*, apart from simply reiterating its general reference to "make ready work orders" made available for inspection on May 27th and 28th, a reiteration the Presiding Judge directed Gulf Power *not* to make, Gulf Power fails to specifically address any aspect of this request. *See Response*, 2-5. Gulf Power should therefore be precluded from introducing any evidence relating to alleged unreimbursed costs relating to Complainants' attachments.

Documents Requests 4, 5, 6, and 7

These four requests asked for Gulf Power's documents pertaining to change-outs and other make-ready done *specifically at the request of Complainants, or cable television attachers other than Complainants*. In the Second Discovery Order, the Presiding Judge ruled that "[a]ll such cost-related documents from 1998 to the present that concern CATV attachers on Gulf Power poles are relevant to the damages issue" and that "[i]t is not sufficient [for Gulf Power] to respond that documents relating to change-outs and make-ready were made available for inspection and copying ...." *Second Discovery Order*, 3. Yet, in its September 30th supplemental responses, Gulf Power failed to specify any particular documents and simply referred, once again, to the entire universe of its "make-ready work orders" including those involving pole change-outs. Supplemental Document Responses, 3-6. This response clearly failed to comply with the *Second Discovery Order*.

In its *Response*, apart from simply reiterating its general reference to "make ready work orders" made available for inspection on May 27th and 28th, a reiteration the Presiding Judge directed Gulf Power *not* to make, Gulf Power fails to specifically address any aspect of these four document requests, numbered 4 through 7. *See Response*, 2-5. Gulf Power should therefore be precluded from introducing any evidence relating to utility pole costs it claims to have incurred due to change-outs and other make-ready work.[5]

Document Request No. 12:

Document request number 12 asked for Gulf Power's documents relating to its contention that there is an "unregulated market for pole space," as that contention applied to CATV (cable)

[5] Gulf Power should be precluded from introducing such cost evidence relating to make-ready and change-outs pertaining to Complainants and other cable television operators. The Presiding Judge already ruled, in denying Complainants' First Motion to Compel as to Complainants' Interrogatories 20-23, that the issue of change-outs and make-ready work done for non-cable (CATV) attachers would not deemed relevant to the hearing in this case. *See Discovery Order*, 10 ("it would be unnecessary to consider evidence of change-outs relating to non-CATV attachments").

attachments. Complainants were forced to limit this request to CATV attachments because, in the August 5, 2005 *Discovery Order*, the Presiding Judge specifically denied several of Complainants' interrogatories on the grounds that they sought evidence relating to non-CATV attachments. *See Discovery Order*, 10 ("it would be unnecessary to consider evidence of change-outs relating to non-CATV attachments"). Subsequently, the Presiding Judge issued, on September 22, 2005, a "Clarification" stating that some "evidence relating to non-CATV pole attachments may be offered in evidence (subject to proffer of relevance)," although the Clarification did not reverse the Presiding Judge's earlier ruling that "evidence of change-outs relating to non-CATV attachers" would be excluded as irrelevant.

In the *Second Discovery Order*, the Presiding Judge noted Gulf's admission that there are no CATV attachers paying an unregulated rate but also ordered that, because Gulf contends that an unregulated market for pole space exists in general, Gulf had to "identify" "by Bates number or other specific document identifier" those documents it contends support its claim that there is an "unregulated market." *Second Discovery Order*, 4. Yet, in its September 30th supplemental responses, Gulf Power failed to do this. Although Gulf Power relied in part upon documents that were previously Bates-stamped with numbers 00826-2309, it continued to refer to "other such documents" "made available" previously in an unspecified "cart." The *Second Discovery Order* required identification of responsive documents by number or "other specific document identifier." A "cart" is not a document-specific identifier.

In its Response, Gulf Power fails to provide any further document-specific identification. In fact, Gulf Power simply refers back to the range of documents that were Bates-numbered (numbers 00826-2309) and produced last April, without saying anything at all about the "other such documents" to which it had more recently referred. Moreover, as the Presiding Judge noted in the

telephone conference call of November 9, 2005, Gulf Power has made no effort to "specify" which of the 1483 documents it is referred to for those documents that have been produced. Accordingly, Gulf Power should be precluded from relying upon any documents other than those Bates numbered 00826-2309 to support its contention that there is an "unregulated market" for pole space, and, as the Presiding Judge has suggested, should be ordered to specify which documents from within the marked documents it actually claims support its contention of an "unregulated market."

II. Gulf Power's Second Supplemental Responses to Interrogatories 8, 20, 34, and 46 Are Inadequate

The Second Discovery Order also required Gulf Power to revisit and supplement its answers to several of Complainants' Interrogatories. Gulf Power's September 30th, 2005 supplemental responses to Interrogatories 8, 20, 34, and 46 do not comply with the ruling in the Second Discovery Order.[6]

Interrogatory No. 8:

Interrogatory number 8 asked Gulf Power to identify, for each pole that it claims is at "full capacity" and for which it allegedly has a "higher valued use," several pieces of information: (1) the attachments by parties *other than* Complainants; (2) how many of these other third-party attachments there are; (3) when the third-party attachments commenced; (4) where those third-party attachments are located on the poles claimed to be "full"; and (5) the make-ready and annual per pole compensation received by Gulf Power from the third parties. Gulf Power's original answer was no answer at all – it claimed that it would "supplement this response upon completion of the Osmose audit." The August 5th *Discovery Order* required Gulf Power to "itemize" the evidence responsive to this Interrogatory. *Discovery Order*, 5. Gulf disobeyed this order, claiming instead

[6] In their Third Motion to Compel, Complainants addressed Interrogatory No. 35. However, upon re-examination, the *Second Discovery Order*, by ruling that Gulf Power will be precluded from offering any evidence at the hearing regarding Gulf Power's purported need to reserve for itself pole space occupied by Complainants, see *Second Discovery Order*, 8, has resolved Complainants' concern regarding Interrogatory No. 35.

that it had already produced such information in documentary form, referring to unspecified copies of attachment agreements and to a general list of attachers. But this is not what the interrogatory asked for. Interrogatory number 8 asks for identification of specific information about attachers *other than* Complainants *on those individual poles for which Gulf Power claims it can satisfy both prongs of the Alabama Power test* ("full capacity" and a lost "higher valued use"). It is impossible for Complainants to determine from a mere general list of attachers and various copies of pole agreements the pole-specific information that this Interrogatory seeks (which information is essential in order to challenge Gulf Power's capacity claims).

In the *Second Discovery Order*, the Presiding Judge cited the first *Discovery Order* and again ordered Gulf Power to answer the questions in Interrogatory number 8, saying "'Gulf Power must revisit Interrogatory No. 8 and its answer to provide information that it currently possess[es] about users, make-ready costs, and per pole compensation, as that information is requested by this Interrogatory." Yet, in its September 30th supplemental answers, Gulf Power once again failed to comply. Instead of producing or identifying a single specific document, Gulf Power reargued its objections and claimed again that it had already produced responsive documents. *See* Gulf Power's *Supplemental Interrogatory Responses*, 2-3. Notably, Gulf Power seems to be confused; its supplemental response refers to information about Complainants' attachments, but that's not what the Interrogatory seeks. Interrogatory No. 8 clearly seeks categories of information about attachers *other than Complainants* on poles containing Complainants' attachments (poles for which Gulf Power claims are at "full capacity" and for which it has a "higher valued use" that could not be accommodated). This information is clearly relevant in order to challenge Gulf Power's assertions that, in fact, each of those poles meet the Alabama Power "capacity" and foreclosed "higher valued use" requirements. Yet, in its Response, Gulf Power continues this confusion, claiming that it has

already directed Complainants to their own pole permits. Perhaps it should be stated again – Interrogatory No. 8 seeks attachment data about the other entities (other than Complainants) on the poles that Gulf Power thinks it can meet the two-pronged *Alabama Power* test

In sum, Gulf Power has not answered Interrogatory No. 8 and has not referred to any specific documents that would permit Complainants to derive an answer. Moreover, Gulf Power represented initially that it would supplement its response to this Interrogatory upon completion of the Osmose Audit but has yet to do so or indicate when it would do so. Accordingly, Gulf Power, which has had many chances to answer, should be precluded from introducing any evidence at the hearing about other, third-party entities on poles that it claims are at "full capacity" and for which it "missed out" on a "higher valued use." 311 F.3d at 1370.

Interrogatory No. 20:

Interrogatory number 20 asked Gulf Power to identify the poles that Gulf Power contends it has had to change out to accommodate Complainants' attachments, the location of such change-outs, the reasons for each change-out, and any instance of where Gulf Power was not reimbursed for the costs of such change-outs. Gulf Power has never answered this question.

In the *Second Discovery Order*, the Presiding Judge ruled that "Gulf Power may [not respond by] merely refer[ring] generally to 'make-ready documents produced'" and that such "*documents must be related to specific poles* that are identified/indicated as being at 'full capacity.'" *See Second Discovery Order*, 7 (emphasis added). However, in its September 30th supplemental answers, Gulf Power directly violated the Judge's order and once again simply referred generally to "make-ready work orders" without specifying any particular documents, without providing the requested information about location, reasons for change-outs, or instances of non-reimbursement,

and, significantly, without relating its response to "specific poles" that Gulf Power claims are at "full capacity."

Instead of answering, Gulf Power proffers the confusing, and irrelevant, claim that "all poles which required make-ready before complainants could attach were at 'full capacity.'" *Supplemental Interrogatory Responses*, 4. Putting aside the logical defect in the claim that make-ready work done to *successfully* accommodate new attachers shows that poles meet the test of "full capacity," an inconsistency recently noted by the Presiding Judge, see FCC 05M-50, Order (Oct. 12, 2005), 3, Gulf Power's claim shows that it is not paying attention to the language in the Interrogatory. Complainants have been on Gulf Power's poles for, in most cases, a decade or two or longer. Interrogatory No. 20 asks for information about where Gulf Power contends that it has had to perform a pole change-out since 1998 in order to accommodate Complainants' attachments. Thus, the question largely seeks data about those instances where, with Complainants already on Gulf Power's poles, Gulf Power contends that it nevertheless had to perform a change-out to accommodate Complainants.

Gulf Power's Response provides no further information or rationale for its refusal to answer Interrogatory No. 20. As Complainants' explained in their Third Motion to Compel, Gulf Power's January 2004 Description of Evidence is replete with contentions that it has had to perform pole change-outs and that this is evidence of "full capacity" on poles containing Complainants' attachments. *See* Description of Evidence, ¶¶ 4-6. Accordingly, Gulf Power's failure to answer this Interrogatory should result in its being barred from introducing any evidence at hearing about the instances where it claims it has had to change out poles to accommodate Complainants' attachments, the locations of and reasons for such change-outs, and any alleged unreimbursed costs that Gulf Power claims it incurred as a result of such change-outs.

Interrogatory No. 34:

Interrogatory number 34 asked two things: (1) does Gulf Power routinely inform attachers when it reserves pole space for its own future core electricity operations; and (2) if so, identify all such instances and describe such reservations. Gulf Power answered the first part by saying "yes," but has never answered the second part. In the *Second Discovery Order*, the Presiding Judge ruled that "Gulf has not provided instances of having provided reservation notices. Gulf must identify instances in which it has advised an attacher, particularly Complainants, that it has demonstrated a need for reserving future space on a pole or poles." *Second Discovery Order*, 7.

However, Gulf Power failed to identify any such instances in its September 30th supplemental responses. Instead, like its prior answers, Gulf Power merely referred again to its "spec plates," *see Supplemental Interrogatory Responses*, 5, which are simply generic form drawings showing, among other things, the electric supply space on utility poles. These "spec plates" are clearly not examples of "instances in which [Gulf Power] has advised an attacher" about a need for reserving future space. Gulf Power claims that these "spec plates" are the only "written" documents reflecting notifications given to attachers about reserved space and that it "has no other further information to provide." *Supplemental Interrogatory Responses*, 5-6. Complainants assume that this means Gulf Power not only has no written proof of having advised any attacher of the need for reserved space but also no oral or testimonial proof. Accordingly, Gulf Power should be barred, as the Presiding Judge stated in the *Second Discovery Order*, from "introducing such evidence at the hearing." *Second Discovery Order*, 7-8.

Interrogatory No. 46:

Interrogatory number 46 asked Gulf Power to identify the rates paid by Gulf Power to other joint use pole owners (principally BellSouth, Sprint, and GTC), and to explain the methodologies

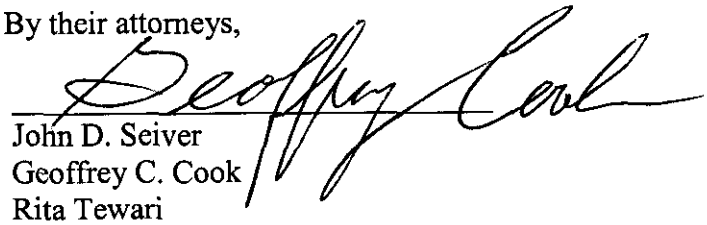
used to calculate such rates. Gulf Power's original answer failed to identify rates or rate methodologies. The first *Discovery Order* directed Gulf to respond. *Discovery Order*, 16. Yet Gulf provided no further response. In the Second Discovery Order, the Presiding Judge ordered that "Gulf Power must either provide a full and complete narrative response, or identify by document and page where responsive methodology/formula[e] are to be found." *Second Discovery Order*, 8. In its September 30th supplemental answer, Gulf Power, for the first time, referenced three pole agreements it produced last April. *See Supplemental Interrogatory Response*, 6. The problem is that, while the referenced documents refer to something called "adjustment rates" and how those adjustment rates are themselves "adjusted" over time, the documents do not explain the methodologies underlying those rates – i.e., how those rates were derived or whether they are based upon any calculation of pole space or other factors. Gulf has provided neither a "full and complete narrative response" nor a specification of documents that *explain* Gulf's rate methodologies.

In its Response to Complainants' motion, Gulf Power provides no further information, claiming instead that it thinks Complainants are not seeking any further response. To the contrary, Complainants are seeking what the Presiding Judge ordered in the *Second Discovery Order* – a narrative response or an identification by document and page of where the "methodology/formula," not merely the rates themselves, "are to be found." Because Gulf Power has failed to provide an explanation of the underlying methodologies leading to the derivation or calculation of these joint user "adjustment rates," Gulf Power should be precluded from introducing any evidence concerning rates paid by its joint use pole owners at the hearing.

CONCLUSION

WHEREFORE, Complainants respectfully request that the Court enter an Order providing the relief described herein, and award such other relief as is just.

By their attorneys,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing, *Complainants' Reply to Gulf Power's Response to Complainants' Third Motion to Compel,* has been served upon the following by electronic mail and U.S. Mail on this the 9th day of November, 2005:

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